

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 18, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP2440-CR

Cir. Ct. No. 2011CF157

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROGELIO CORTEZ, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: TERENCE T. BOURKE, Judge. *Affirmed.*

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Rogelio Cortez, Jr., appeals from a judgment convicting him of repeated sexual assault of a child as a persistent repeater. He contends that the circuit court erroneously exercised its discretion by admitting other acts evidence against him and refusing to admit evidence of prior allegations

of sexual assault made by the victim. He further contends that he should receive a new trial in the interest of justice. We reject Cortez's claims and affirm the judgment.

¶2 On April 6, 2011, the State filed a criminal complaint charging Cortez with repeated sexual assault of a child as a persistent repeater. The charge stemmed from allegations that Cortez had sexual contact with his stepdaughter M.R. on numerous occasions when she was between the ages of ten and eleven. The assaults took place at their home when M.R.'s mother was away at work. Cortez touched M.R.'s breasts and vaginal area and inserted his fingers in her vagina. Sometimes he had her hold his penis in her hand, and then he would hold his hand over hers and move her hand back and forth on his penis. Cortez used physical violence and verbal threats to keep M.R. from telling anyone what he was doing.

¶3 Prior to trial, the State moved for the admission of other acts evidence against Cortez. The other acts evidence consisted of statements from Cortez's sister, V.C. According to V.C., approximately eighteen years before the incidents with M.R., Cortez began touching her vagina while they lived in the same family home. The sexual abuse occurred when their mother was away and lasted for several years when V.C. was between the ages of nine and thirteen. Cortez touched her vagina with his hand, under her clothes.¹ Like M.R., V.C. was fearful of Cortez. At one point when she threatened to tell their mother, he grabbed her and slammed her against a brick wall. After hearing arguments on the

¹ Cortez was convicted of incest with a child for his actions towards V.C.

matter, the circuit court granted the State's motion to admit this other acts evidence.

¶4 Also prior to trial, Cortez moved for the admission of evidence of prior allegations of sexual assault made by M.R. With his motion, Cortez provided an affidavit of H.P., the mother of M.R. The affidavit stated that in January 2011, M.R. reported to the police a sexual assault that had occurred near Thanksgiving 2010. The affidavit further stated that M.R. "had a medical examination done. The doctor said that there was no tearing to indicate rape. The police did not pursue any further investigation and accused my daughter of fabricating the story."

¶5 The circuit court held a hearing on Cortez's motion. There, H.P. acknowledged that M.R. never changed her story or said that she lied about the prior sexual assault. Paul Hammann, a detective with the City of Sheboygan Police Department who had interviewed M.R. about the prior assault, also testified. According to Hammann, M.R. indicated that two people were involved in the assault—one man who drove a white pick-up truck with a black stripe and another man who pulled her into the vehicle. Hammann explained that M.R. could not identify the men and did not provide sufficient details to enable the police to make an arrest. He further explained that there are many times when there is no physical or medical evidence of a sexual assault, even though one has occurred. He noted that the case remained open. He also noted that M.R. never recanted her story and that no one ever indicated that M.R. was lying to him. At the conclusion of the hearing, the circuit court denied Cortez's motion to admit the prior allegations.

¶6 After the circuit court's ruling, Cortez filed another motion asking the court to allow him to present some limited version of the evidence to show that M.R. was experienced in dealing with police. Cortez's essential theory was that (1) M.R. had an understating of the likely effects of reporting crimes to the police, which arguably include sympathy and attention; (2) her possible motive in accusing Cortez of assaulting her was to attract sympathy and attention; and (3) she knew and had an understanding of how to manipulate the system. Again, the circuit court denied Cortez's motion.

¶7 Ultimately, the case proceeded to trial and a jury found Cortez guilty of the charged offense. The circuit court subsequently sentenced him to life imprisonment without the possibility of extended supervision. This appeal follows.

¶8 On appeal, Cortez first contends that the circuit court erroneously exercised its discretion by admitting the other acts evidence against him. Primarily, he complains about the length of time and difference in his age between the other acts and charged offense.

¶9 The admissibility of other acts evidence is determined by using a three-step test: (1) whether the evidence is offered for a permissible purpose under WIS. STAT. § 904.04(2) (2011-12);² (2) whether it is relevant under WIS. STAT. § 904.01; and (3) whether its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the jury, or needless delay under WIS. STAT. § 904.03. *State v. Sullivan*, 216 Wis.2d 768, 772-73, 576 N.W.2d 30

² All references to the Wisconsin Statutes are to the 2011-12 version.

(1998). Section 904.04(2) favors admissibility of other acts evidence except when offered to prove the propensity of the defendant to commit similar acts. *See State v. Speer*, 176 Wis. 2d 1101, 1115, 501 N.W.2d 429 (1993). In a sex crime case, especially one involving a child victim, the admissibility of other acts evidence must be viewed in light of the “greater latitude” rule, which “helps other acts evidence to come in under the exceptions stated in WIS. STAT. § (Rule) 904.04(2).” *State v. Hammer*, 2000 WI 92, ¶23, 236 Wis. 2d 686, 613 N.W.2d 629.

¶10 A circuit court’s decision to admit other acts evidence involves the exercise of discretion and will not be disturbed absent an erroneous exercise of discretion. *See id.*, ¶21. We will uphold the circuit court’s decision if discretion was exercised in accordance with accepted legal standards and the facts of record, and if there was a reasonable basis for the court’s determination. *Id.*

¶11 Here, the circuit court conducted a thorough analysis under *Sullivan* before admitting the other acts evidence. First, it determined that the other acts evidence was offered for a proper purpose: to show that Cortez’s touching of M.R.’s vagina was intentional, was part of a plan, and was done for Cortez’s sexual arousal or gratification. Next, the court found that, notwithstanding its remoteness in time, the evidence was relevant to prove two elements of the charged offense: that Cortez intentionally touched M.R.’s intimate parts, and that he did so for the purpose of obtaining sexual gratification.³ Finally, the court

³ Cortez claims that the other acts evidence was not relevant because his defense at trial was that he never touched M.R. sexually. The fact that Cortez denied sexually assaulting M.R. did not make the other acts evidence irrelevant. *See State v. Hammer*, 2000 WI 92, ¶25, 236 Wis. 2d 686, 613 N.W.2d 629 (“If the state must prove an element of a crime, then evidence relevant to that element is admissible, even if a defendant does not dispute the element.”).

concluded that the probative value of the other acts evidence outweighed the danger of unfair prejudice.⁴

¶12 Reviewing the circuit court’s decision, we are satisfied that it properly exercised its discretion in admitting the evidence in question. Although the length of time and difference in Cortez’s age between the other acts and charged offense was significant, it was not so great as to attenuate a rational or logical connection between them given their substantial similarities. *See State v. Mink*, 146 Wis. 2d 1, 16, 429 N.W.2d 99 (Ct. App. 1988) (recognizing that remoteness in time may be balanced against the similarity in events).⁵ After all, in both cases, the girl was at the tender age of nine or ten years old when Cortez began his assaults; Cortez had familial or quasi-familial relationship with each girl; Cortez lived in the same home with each girl; Cortez took advantage of each girl in a relationship which involved an implied trust; Cortez abused each girl when her mother was not at home; Cortez engaged in similar sexual activity with each girl—touching her vaginal area with his hand; and Cortez used physical and verbal threats to keep each girl from telling anyone what he was doing to them. Accordingly, we conclude that there was a reasonable basis for the circuit court’s determination.

⁴ The circuit court reduced the danger of unfair prejudice at trial with a limiting/cautionary instruction to the jury.

⁵ Wisconsin appellate courts have upheld the admissibility of other acts evidence when the acts occurred in similarly remote timeframes. *See State v. Kuntz*, 160 Wis. 2d 722, 729, 467 N.W.2d 531 (1991) (upholding the admissibility of other acts evidence that occurred sixteen years before the conduct charged); *State v. Mink*, 146 Wis. 2d 1, 16-17, 429 N.W.2d 99 (Ct. App. 1988) (admitting evidence of prior sexual contact with a child that occurred thirteen to twenty-two years prior to the conduct charged).

¶13 Cortez next contends that the circuit court erroneously exercised its discretion by refusing to admit evidence of prior allegations of sexual assault made by M.R. He maintains that the prior allegations undermined the credibility of M.R.

¶14 The rape shield law, WIS. STAT. § 972.11, generally prohibits evidence of the complainant's prior sexual conduct. *State v. Ringer*, 2010 WI 69, ¶25, 326 Wis. 2d 351, 785 N.W.2d 448. One exception to this general prohibition allows for the admission of “[e]vidence of prior untruthful allegations of sexual assault made by the complaining witness.” Sec. 972.11(2)(b)3. Before it admits evidence of prior untruthful allegations, the circuit court must determine: “(1) whether the proffered evidence fits within [§] 972.11(2)(b)3[.]; (2) whether the evidence is material to a fact at issue in the case; and (3) whether the evidence is of sufficient probative value to outweigh its inflammatory and prejudicial nature.” *State v. DeSantis*, 155 Wis. 2d 774, 785, 456 N.W.2d 600 (1990).

¶15 The admission or exclusion of evidence is a discretionary circuit court decision and will not be disturbed absent an erroneous exercise of discretion. *See State v. Doerr*, 229 Wis. 2d 616, 621, 599 N.W.2d 897 (Ct. App. 1999). Again, we will uphold the circuit court's decision if discretion was exercised in accordance with accepted legal standards and the facts of record, and if there was a reasonable basis for the court's determination. *Hammer*, 236 Wis. 2d 686, ¶21.

¶16 In denying Cortez's motions to admit the prior allegations of sexual assault, the circuit court determined that (1) the proffered evidence did not fit within WIS. STAT. § 972.11(2)(b)3. because, at best, it showed that the prior allegations were unsubstantiated (as opposed to untruthful) and (2) allowing a

limited version of the evidence to be admitted would have very little probative value and was too prejudicial.

¶17 Again, we are satisfied that the circuit court properly exercised its discretion in excluding the evidence in question. The fact that police have been unable to pursue their investigation due to insufficient information does not support a finding that the prior allegations of sexual assault were untruthful for purposes of WIS. STAT. § 972.11(2)(b)3. See *Ringer*, 326 Wis. 2d 351, ¶40 (the fact that an alleged assailant was never prosecuted for prior allegations does not conclusively support a finding that the allegations were untruthful). Likewise, given the amount of time that passed between the alleged assault and medical examination, the lack of physical evidence does not support such a finding either. The only information that hints at the possibility of untruthful allegations was the statement of H.P., who indicated that police had accused M.R. of fabricating the story. However, she did not identify which police officers accused M.R. of that. Moreover, her account was refuted by Hammann, who testified that the case remained open and that no one ever indicated that M.R. was lying to him.

¶18 As for Cortez's request to present some limited version of the evidence to the jury, he failed to show how M.R.'s experience in dealing with police was relevant and material to any fact of consequence to the case. After all, Hammann's testimony did not indicate that M.R. received sympathy and attention for reporting the prior incident. Furthermore, Cortez's theory that the prior police report and investigation gave M.R. a motive to lie about Cortez to get sympathy and attention assumes that the prior incident was untrue.⁶ As noted, Cortez failed

⁶ After all, if M.R.'s prior report was true, that would not logically provide M.R. with a motive to lie about Cortez to get sympathy and attention.

to provide evidence from which one could reasonably find the prior incident was untrue. In any event, the prejudicial nature of the evidence warranted its exclusion, as it would have confused the jury and distracted them from the issues at hand. For these reasons, we conclude that there was a reasonable basis for the circuit court's determination.

¶19 Finally, Cortez contends that he should receive a new trial in the interest of justice. He asks for this relief pursuant to WIS. STAT. § 752.35.

¶20 We exercise our discretionary power to grant a new trial infrequently and judiciously. See *State v. Ray*, 166 Wis. 2d 855, 874, 481 N.W.2d 288 (Ct. App. 1992). We have determined that no error occurred as to the evidentiary issues that Cortez has raised on appeal. We therefore conclude that no basis exists to order a new trial under WIS. STAT. § 752.35.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

